SUPREME COURT, U.S.

JUL 11 1958

JOHN T. FEY, Clerk

In the Supreme Court of the United States

No. 168

OCTOBER TERM, 1958.

HENRY N. WALKDEN,
As Executor of the Last Will and Testament of
NATHANIEL H. WOODS, Deceased,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals,
For the Sixth Circuit.

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In the Supreme Court of the United States

No. .....

OCTOBER TERM, 1958.

HENRY N. WALKDEN,
As Executor of the Last Will and Testament of
NATHANIEL H. WOODS, Deceased,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals, For the Sixth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Now comes Henry N. Walkden, as Executor of the Last Will of Nathaniel H. Woods, deceased, and petitions the court for a Writ of Certiorari to the Court of Appeals of the Sixth Circuit in the above entitled case, No. 13,495 in said court, in which a judgment or decree was entered on the 21st day of May, 1958 (appendix page 62, *infra*).

OPINIONS IN THE COURTS BELOW.

The unreported opinions of United States District Court Judge Jones, attached to the appendix hereto at pages 58, 60 and 60 respectively, are as follows:

1. Re overruling the defendant's motion to dismiss the complaint, rendered May 20th, 1957.

2. Re overruling the petitioner's motion for summary judgment, granting the motion of the defendant for summary judgment and dismissing the complaint, rendered October 30, 1957.

3. Re overruling application for re-hearing, rendered December 5, 1957.

The per curiam opinion of the Court of Appeals, rendered May 21, 1958, is not yet officially reported but appears in the appendix hereto, page 61.

STATEMENT OF JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1). The judgment of the Court of Appeals was entered on May 21, 1958.

QUESTIONS PRESENTED.

The following questions are presented by this petition:

(1) Does the Statute of Limitations, Section 910 of the Internal Revenue Code of 1939, as amended, have any application to the claim of the Petitioner?

The United States District Judge and the Court of Appeals answered: Yes. Petitioner contends that the answer should be: No.

(2) If said Statute of Limitations does apply, then when did it start to run in this case?

The United States District Judge and the Court of Appeals answered: April 16, 1953.

Petitioner contends that the answer should be: December 14, 1955.

(3) Assuming that the Statute of Limitations otherwise applies, can money paid to, and collected by, the Collector of Internal Revenue of United States of America

under a mutual mistake of fact be recovered if claim therefor is filed within the p riod of the Statute of Limitations after discovery of the nistake?

The United States District Judge and the Court of Appeals answered: No.

Petitioner contends that the answer should be: Yes.

(4) Was it not error for the courts below to fail to pass specifically upon the foregoing questions, all of which were seriously raised and carefully briefed and argued, none of which questions have heretofore been determined in the Supreme Court but which should be decided here.

STATUTES INVOLVED.

The statutes involved are as follows:

1. Section 910 of the Internal Revenue Code of 1939:

"Period of Limitation for Filing Claims.

All claims for the refunding *of the tax imposed by this subchapter* alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund." (Emphasis added.)

2. Section 7422 (a) of the Internal Revenue Code of 1954:

"Civil Actions for Refund.

(a) No Suit Prior to Filing Claim For Refund.—No suit or proceeding shall be maintained in any court for the recovery *of any internal revenue tax* alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to

have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, *according to the provisions of law in that regard,* and the regulations of the Secretary or his delegate established *in pursuance thereof.*" (Emphasis added.)

STATEMENT OF FACTS.

Nathaniel H. Woods died on August 4, 1950. He left two wills, both properly executed. He was born February 16, 1860.

One will was made in 1944. In it he left the residue and principal part of his estate to a nephew and named the nephew as executor. The other was executed in 1948 and in it he left the residue and principal part of his estate to the Cleveland Public Library, and named a cousin, Henry N. Walkden, executor.

On August 5, 1950, the nephew filed application to probate the 1944 will, and it was admitted to probate on August 8, 1950, at which time letters testamentary were issued to the nephew. He proceeded with the administration of the estate. During the time he acted as executor, he filed an estates tax return on December 3, 1951 with the Collector of Internal Revenue at Cleveland (Exhibit A attached to the defendant's motion for summary judgment in accordance with the request of the plaintiff for its disclosure), and paid a total sum of $13,476.50, which sum would have been due if the 1944 will had been the true will. In Schedule M of this tax return said executor disclosed that there was litigation pending concerning that will. This information was given in answer to a direct question asked by the government in the form required by the defendant to be used in making estates tax returns. By this information the defendant was put on notice

of the uncertain status of the money received. This money was paid by said executor and collected by the Director of Internal Revenue under the mutual mistake of fact that the 1944 will was the last will of said decedent.

The 1944 will was contested by the executor of the 1948 will and was set aside on the ground that in fact it was not the last will. There was also litigation over the probate of the 1948 will, and after it had finally been admitted to probate on April 10, 1953, it was contested by the daughter of the testator who was his sole heir at law, and by the nephew who was the principal beneficiary of the 1944 will. Henry N. Walkden, the appellant, was qualified as executor of the 1948 will on April 16, 1953. The first action to contest the 1948 will was filed within three months thereafter.

The litigation between the two wills consumed over five years of time, and it was not until December 14, 1955, that the 1948 will was finally sustained as the last will. Under the 1948 will no estates tax at all was imposed by law because of the public charitable, scientific, literary, or educational purposes of the Cleveland Public Library.

The true facts concerning this estate were not known until December 14, 1955 and it was not possible for anyone to determine prior to that date whether the estates tax was imposed on this estate by the law, because it was then determined that the 1948 will was in fact the last will, under which state of facts no estate tax was imposed by the law. If the contests of the 1948 will had prevailed, the decedent's estate would have been subject to the tax.

The executor of the 1948 will filed a Corrected Estates Tax Return on August 30, 1956, which disclosed that under the true facts pertaining to said estate, no estates tax at all was imposed on the estate by the law. Attached to said Corrected Return was a certified copy of the 1948

and last will, and a claim for the refund of the $13,476.50 plus interest.

(It was later learned by the executor of the 1948 will, the petitioner herein, that the Cleveland Public Library had filed a claim for the refund of this money on June 21, 1956, and that said claim had been denied on the stated ground that "It was not timely filed." The Cleveland Public Library was not a proper party entitled to make claim directly for the repayment of this money, and it seems that the filing of this claim by the Library was probably not authorized by law.)

The claim of Henry N. Walkden as executor of the last will was rejected by the Director of Internal Revenue on October 10, 1956, on the stated ground that "It was not timely filed."

The complaint was duly filed in this action in the United States District Court on the 4th day of December, 1956.

On February 2, 1957 the defendant filed a motion to dismiss the complaint.

On May 20, 1957 Judge Jones filed his memorandum opinion.

On May 22, 1957 Judge Jones filed an entry denying the motion to dismiss the complaint.

On May 29, 1957 the defendant filed its answer.

On June 18, 1957 the plaintiff filed a motion for summary judgment in his favor.

On July 15, 1957 the defendant filed a motion in opposition to the plaintiff's motion for summary judgment and for summary judgment for the defendant.

On October 30, 1957 Judge Jones filed his memorandum opinion. (Appendix p. 60.)

On October 31, 1957 Judge Jones overruled the plaintiff's motion for summary judgment, granted the de-

fendant's motion for summary judgment, and dismissed the complaint.

On November 7, 1957 the plaintiff filed a motion for a new trial, which was treated by the Court as a motion for reconsideration.

On December 5, 1957 Judge Jones filed his memorandum opinion. (Appendix p. 60.)

On December 6, 1957 Judge Jones overruled the motion for a new trial.

On December 26, 1957 Notice of Appeal and bond for costs were duly filed.

On May 21, 1958 the Court of Appeals affirmed the District Court.

SUMMARY OF ARGUMENT.

Section 910 of the Internal Revenue Code of 1939 provides a statute of limitations on claims for refunds of estate taxes. The section is so limited by its language "All claims for the refunding of the tax imposed by this subchapter."

In this case there were no estate taxes when the true facts were discovered. It took over five years of litigation in the state courts to discover that the 1944 will of the decedent, which was first probated, was not his last will and that the 1948 will was his valid and last will.

The executor of the 1944 will paid the money which is the subject to this action, to the defendant *as* an estate tax under the mistake of fact that the 1944 will was the last will, under which or if the decedent had died intestate, the money would have been due as such tax.

Under the 1948 will the Cleveland Public Library was the residuary and principal beneficiary and because of its public character the estate was exempt from estate taxes.

The statute of limitations therefore had no application to this claim.

Next, if the statute did apply then it did not start to run until an allowable claim could have been filed which was on and after December 14, 1955 when the 1948 will was sustained in actions to contest its validity. If the executor of the 1948 will had filed a claim for refund before that date his claim could not have been allowed because of the pendency of two actions to contest that will, both of which actions were filed within a short time of his appointment.

Attention is also directed to the fact that this money was paid, and collected, under a mutual mistake of fact, and as such, is recoverable without regard to this statute of limitations.

The courts below failed to make any specific ruling on the issues presented with supporting authorities. It is urged that it was error to fail to do so.

The questions in issue are important to all of the people and also to the Internal Revenue Department, for these questions have not been specifically decided in the Supreme Court as to the statutes here involved.

The Court of Appeals relied on Section 7422 (a) of the Internal Revenue Code of 1954. However, that section also relates to "any internal revenue tax" and does not stand alone. It refers, as to the case at bar, to Section 910 of the Internal Revenue Code of 1939.

Section 910 provides that claims for refunds must be filed within three years from the payment of the tax. The tax was paid on December 3, 1951 and an additional amount, fixed by the Director of Internal Revenue, on December 14, 1953. The courts below held that this statute started to run against the petitioner's claim on April 16, 1953, when he was appointed executor.

It is respectfully urged that since the defendant admits that it was not entitled to this money under the true facts, wouldn't it be proper to hold that the statute, if at all applicable, started to run on December 14, 1955, when the 1948 will was finally determined to be the valid will of the testator?

ARGUMENT.

(1) The Statute of Limitations, Section 910 of the Internal Revenue Code of 1939, as amended, has no application at all to the claim of the Petitioner.

Section 910 of the Internal Revenue Code of 1939 reads as follows:

"PERIOD OF LIMITATION FOR FILING CLAIMS

> All claims for the refunding *of the tax imposed by this subchapter* alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of *such tax*. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, *or if no claim was filed,* then during the three years immediately preceding the allowance of the refund." (Emphasis added.)

It is clear that estates taxes may be imposed on an estate only by a law duly passed by Congress. It is also clear that whether an estates tax is imposed on a particular estate by the law can not be properly determined until the true facts concerning the estate are known.

It will be noted that this is not an action for the refund of an estates tax, but for the refund of money paid to the defendant, and collected by the defendant, under a mutual mistake of fact. The refund claimed is not a refund in the sense of this statute.

There is no claim in this case that any estates tax was imposed upon this estate by any law.

Therefore, the language of Section 910 of the Internal Revenue Code of 1939, which becomes pertinent is as follows: "All claims for the refunding of *the tax imposed by this subchapter* * * * must be presented to the Commissioner within three years next after the payment of *such tax*." (Emphasis added.) It is apparent, therefore, that this statute has no application to the case at bar because by its very words, it applies only to estates on which an estate tax has been *imposed* by the law. *No tax* was *imposed* on the estate in the case at bar when the true facts became known because of the public charitable, scientific, literary, or educational purposes of the Cleveland Public Library.

Section 812 (d) of the Internal Revenue Code of 1939 specifically provided:

> "For the purpose of the tax, the value of the net estate shall be determined, in the case of a citizen or resident of the United States, by deducting from the value of the gross estate: * * * (d) Transfers for Public, Charitable, and Religious uses.—The amount of all bequests, legacies, devises, or transfers * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes * * *, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, * * *."

It is not denied that the Cleveland Public Library is a corporation which comes exactly within the terms of this section, nor does the defendant claim that any estates tax was imposed on this estate by any law. The only

defense relied on is the Statute of Limitations, which by its very terms is limited to refunds where a tax has been imposed.

It is not only apparent that no estates tax was imposed on this estate by law, but it is also certain that the law expressly exempts this estate from the tax.

It seems that the defendant must, under such circumstances, establish to a certainty that the Statute of Limitations did apply. This, we believe, the defendant has entirely failed to do.

The wording of Section 910 of the Internal Revenue Code of 1939 is so explicit as to the claims to which it does apply that it may be reasonably inferred that it was not intended to apply to claims where no tax had been imposed.

The question presented has never been determined by the Supreme Court and should be decided in this Court.

It seems that we can test the soundness of the Government's position in this case at bar in part by considering the effect of the Statute of Limitations if the reverse of the circumstances in the case at bar had happened.

The statute which placed a three year limitation on the right of the Government to collect the estate taxes was Section 874(a) of the Internal Revenue Code of 1939, which reads as follows:

> "Except as provided in subsection (b) the amount of estate taxes imposed by this subchapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of three years after the return was filed."

If the 1948 will had first been admitted to probate and the executor qualified to act thereunder had filed an estates tax return showing no tax due, then over five

years litigation between the two wills had finally resulted in the probate of the 1944 will on April 16, 1953, and in the sustaining of the 1944 will as the true will on December 14, 1955, it is most unlikely that the Government would be contending now that the Statute of Limitations would prevent the collection of the estates tax which would then be due.

While it seems that no authority need be cited here for the well established law that tax laws and any elements of doubt in them are strictly construed against the government and in favor of the taxpayer, there are several cases to which attention should be called. The first is that of *Eidman vs. Martinez*, 184 U. S. 578 (1902), in which the first paragraph of the syllabus reads as follows:

> "Congress is bound to express its intention to tax in clear and unambiguous language, and a liberal construction should be given to words of exception confining the operation of the duty."

At page 583 the Court finds:

> "It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of exception confining the operation of duty * * *."

Another case is that of *Schwab, Exr., vs. Doyle, Collector*, 258 U. S. 529 (1922), in which the Act of 1916 imposing a tax on certain transfers made without consideration within two years prior to death, which were treated as made in contemplation of death, and which law became effective seven days before the decedent died, was before the court for construction. The government contended that the law applied to the estates of all persons who died

after its effective date and to all such transfers whenever made. Before the case was decided in the Supreme Court, Congress had passed a provision contained in the Act of 1918 specifically making the tax applicable to transfers made before or after the effective date. The government contended that this act was merely elucidation of the original 1916 Act.

However, the Supreme Court held that "tax measures are strictly construed," and that if Congress had intended the law to apply to transfers made before its effective date, it should have specifically provided for that.

A case which illustrates a strict construction against the government in refund cases is *American Watch Company vs. Commissioner*, 229 Fed. 2nd 672 (1956), where the taxpayer had paid some excess profits taxes and filed claims for the refund of the same, but had been dissolved and had ceased to exist as a corporation under a Rhode Island statute three years thereafter. The claim had been made under Section 722 of the Internal Revenue Code of 1939 as amended. The Commissioner had held the claims for from five to nine years before passing on them. The Tax Court found for the government, but on review by the U. S. Court of Appeals for the Second Circuit, the decision was reversed.

The Commissioner argued that the filing of the petition within the ninety day limit provided by the law was a new proceeding and that at that time the taxpayer was no longer in existence (by reason of the Rhode Island statute).

The Court held at page 675:

> "Were the Commissioner's contention accepted, he could by his own act of delaying his determination, destroy a taxpayer's right to the relief which Congress granted. His position, adopted by the Tax Court,

resembles that of Coke, in his fortunately unsuccessful attempts to destroy the equitable powers of the Chancellor. The need today for government revenue is indeed great, but not so great as to justify the stingy interpretation the government here espouses. The country is not that hard up. * * * .

"We reject the Commissioner's suggestion that the sole available method of avoiding injustice to these taxpayers was the appointment of receivers in 1947 at the time of the dissolutions for no purpose except that of filing petitions with the Tax Court, if the Commissioner in his uncontrollable discretion should happen to postpone his determination for more than three years. Surely taxpayers should not have to incur this added expense in anticipation of administrative delay."

It will be noted that in the case at bar, Judge Jones found in his memorandum opinion (p. 58) that any allegations that the taxes were erroneously collected would have been false prior to December 14, 1955, when litigation declaring the second will valid, was terminated, and that he also said that:

"If this claim is barred by the statute, the substantive rights of the parties are being affected by the length of the docket in the Courts of Ohio, and if litigation could have been terminated within three years of the payment, there would be no defense to this action."

In the case at bar the petitioner did not know that the 1948 will would prove to be the true will of the decedent until the two actions to contest the will ended on December 14, 1955. Nor could the Director of Internal Revenue have allowed a claim for refund of this money if the executor of the 1948 will had filed such a claim before that time. That was the *earliest* date on which *an allow-*

able claim could have been filed. December 14, 1955 was the date on which the mistake of fact concerning this estate was established.

Defense counsel relied on a practice, *unsupported by any authority,* of filing claims for refund of estate taxes in anticipation of *later* having actual *allowable* claims, and urged that the Statute of Limitations began to run when the appellant was qualified as executor of the 1948 will on April 16, 1953. That view was adopted by Judge Jones in the District Court and by the Court of Appeals.

However, if the petitioner had filed a claim at that time, the Director of Internal Revenue could not have properly allowed the claim because of the pending actions to contest the 1948 will, which might have been set aside in either of said actions, in which event there would have been no right to recover the money paid because the estate would then have had the tax "imposed" on it by law.

It will be noted that there is a sharp distinction between the *assessment* of a tax and the *imposition* of a tax by law. This distinction is discussed by the Supreme Court of the United States in the case of *Bull vs. U. S.*, 295 U. S. 247 (1935), beginning on page 259 as follows:

> "A tax is an exaction by the sovereign, and necessarily the sovereign has an enforcible claim against every one within the taxable class for the amount lawfully due from him. The statute prescribes the rule of taxation. Some machinery must be provided for applying the rule to the facts in each taxpayer's case, in order to ascertain the amount due. The chosen instrumentality for the purpose is an administrative agency whose action is called an assessment. The assessment may be a valuation of property subject to taxation which valuation is to be multiplied by the statutory rate to ascertain the amount of tax. Or it may include the calculation and fix the amount

of tax payable, and assessments of federal estate and income taxes are of this type. Once the tax is assessed the taxpayer will owe the sovereign the amount when the date fixed by law for payment arrives. Default in meeting the obligation calls for some procedure whereby payment can be enforced. The statute might remit the Government to an action at law wherein the taxpayer could offer such defense as he had. A judgment against him might be collected by the levy of an execution. But taxes are the life-blood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection. The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt.

In recognition of the fact that erroneous determinations and assessments will inevitably occur, the statutes, in a spirit of fairness, invariably afford the taxpayer an opportunity at some stage to have mistakes rectified. Often an administrative hearing is afforded before the assessment becomes final; or administrative machinery is provided whereby an erroneous collection may be refunded; in some instances both administrative relief and redress by an action against the sovereign in one of its courts are permitted methods of restitution of excessive or illegal exaction. Thus the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer. The assessment supersedes the pleading, proof and judgment necessary in an action at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution. But these re-

versals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign. If that which the sovereign retains was unjustly taken in violation of its own statute, the withholding is wrongful. Restitution is owed the taxpayer. Nevertheless he may be without a remedy. But we think this is not true here."

The cases allowing recovery of taxes by way of recoupment, notwithstanding admittedly applicable statutes of limitations, disclose the well established law favoring refunds of money improperly collected by the Commissioner of Internal Revenue.

In the case of *Dunigan vs. U. S.*, No. 9338 of 38-2 U. S. Tax Cases, 23 Fed. Supp. 467 (1938), the Court of Claims held that although the Statute of Limitations had run on a claim for refund of estates tax, the amount claimed in that case might be credited on income taxes which the Commissioner sought to collect on the same money. The decree was based on the theory of recoupment and followed the principles decided in *Bull vs. U. S.*, 295 U. S. 247 (1935), in which case the decedent was a partner under a partnership agreement which provided that upon the death of a partner the survivors should be at liberty to continue the business for a year, giving the estate of the decedent his share of the profits, which share was to be treated as payment for his share in the business. Such money was received by the executor, and an estates tax was paid on it. Later, the government proceeded to collect an income tax on the identical money, and the executor filed suit in the Court of Claims for recovery of the money by way of recoupment upon the income taxes assessed to the extent of the estate taxes which had been paid upon the same money. On its face, the Statute of Limitations had run.

The Supreme Court in *Bull vs. U. S., supra*, had expressed the opinion that no sale of the decedent's interest in the business was established and that the money was properly taxable as income, but held that the government, through a palpable mistake, had taken more than it was entitled to. It said at page 260:

> "In a proceeding for the collection of estate tax, the United States through a palpable mistake took more than it was entitled to. Retention of the money was against morality and conscience. But claim for refund or credit was not presented or action instituted for restitution within the period fixed by the Statute of Limitations. If nothing further had occurred Congressional action would have been the sole avenue of redress.
>
> "In July, 1925, the Government brought a new proceeding arising out of the same transaction involved in the earlier proceeding. This time, however, its claim was for income tax. The taxpayer opposed payment in full, by demanding recoupment of the amount mistakenly collected as estate tax and wrongfully retained. Had the Government instituted an action at law, the defense would have been good. The United States, we have held, cannot, as against the claim of an innocent party, hold his money which has gone into its treasury by means of the fraud of its agent. United States v. State Bank, 96 U. S. 30. While here the money was taken through mistake without any element of fraud, the unjust retention is immoral and amounts in law to a fraud on the taxpayer's rights. What was said in the State Bank case applies with equal force to this situation. 'An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial * * *. In

these cases, (cited in the opinion) and many others that might be cited, the rules of law applicable to individuals were applied to the United States' (pp. 35, 36). A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, as shown by the authority referred to, but may be used by way of recoupment and credit in an action by the United States arising out of the same transaction. United States v. Macdaniel, 7 Pet. 1, 16, 17; United States v. Ringgold, 8 Pet. 150, 163-164. In the latter case this language was used: 'No direct suit can be maintained against the United States; but when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them, it would be a very rigid principle, to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to Congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to Congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defense, to a suit by the United States.' If the claim for income tax deficiency had been the subject of a suit, any counter demand for recoupment of the overpayment of estate tax could have been asserted by way of defense and credit obtained notwithstanding the statute of limitations had barred an independent suit against the Government therefor. This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of Limitations so long as the main action itself is timely.

"The circumstance that both claims, the one for estate tax and the other for income tax, were prosecuted to judgment and execution in summary form does not obscure the fact that in substance the proceedings were actions to collect debts alleged to be due the United States. It is immaterial that in the second

case, owing to the summary nature of the remedy, the taxpayer was required to pay the tax and afterwards seek refundment. This procedural requirement does not obliterate his substantial right to rely on his cross-demand for credit of the amount which if the United States had sued him for income tax he would have recouped against his liability on that score.

"To the objection that the sovereign is not liable to respond to the petitioner the answer is that it has given him a right of credit or refund, which though he could not assert it in an action brought by him in 1930, had accrued and was available to him since it was actionable and not barred in 1925 when the Government proceeded against him for the collection of income tax.

"The pleading was sufficient to put in issue the right to recoupment. The Court of Claims is not bound by any special rules of pleading; all that is required is that the petition shall contain a plain and concise statement of the facts relied on and give the United States reasonable notice of the matters it is called upon to meet. And a prayer for alternative relief, based upon the facts set out in the petition may be the basis of the judgment rendered.

"We are of opinion that the petitioner was entitled to have credited against the deficiency of income tax, the amount of his overpayment of estate tax with interest and that he should have been given judgment accordingly. The judgment must be reversed and the cause remanded for further proceedings in conformity with this opinion."

The third paragraph of the syllabus reads as follows:

"Retention by the Government of money wrongfully exacted as taxes, is immoral and amounts in law to a fraud on the taxpayer's rights."

The attention of the Court is especially directed to the language of the last sentence in Section 910 of the Internal

Revenue Code of 1939 quoted in full at page 3 of this Petition, which provides that as to cases in which the section applies the amount of the refund shall not exceed the portion of "the tax" paid during the three years immediately preceding the filing of the claim, "or if no claim was filed" then during the three years immediately preceding the allowance of the refund.

It will be noted that this language thus specifically provides for refunds in proper cases, even where no claim for the refund has been filed. The section does not state exactly to what situations that language is intended to apply. However, it is certainly broad enough to provide for refunds in cases such as the one at bar in which the Collector of Internal Revenue had been put on notice in Schedule M of the estates tax return filed by the executor of the 1944 will on December 3, 1951 that there was litigation then pending concerning the 1944 will. This required the Collector of Internal Revenue to be on notice concerning the uncertain status of the money he collected from this estate and if his department had performed its full duty under the law it would have held the money collected pending final determination of the true facts, and as soon as the true facts were brought to his attention by the executor of the 1948 will filing the corrected estates tax return on August 30, 1956, together with a claim for refund of the money which had been paid and collected under the belief that the 1944 will was the last will, the money would have been refunded at once.

Under the authorities cited above it is established that tax statutes are strictly construed against the government and in favor of the taxpayer. It is a rule arising in the highest principles of justice, because the right of the government of the United States to collect tax money, or to keep money already received as tax money, depends

upon the laws passed by Congress and if the law has not imposed the tax then there is none and the money collected should be refunded without question as soon as the true facts are learned and are presented to the Internal Revenue Department in any intelligible fashion.

Section 910 of the Internal Revenue Code of 1939 was clearly not intended to prevent refunds in cases where no tax was imposed by the law. That section is, by its terms, limited to cases where a tax has been imposed by the law. The language was manifestly intended to prevent refunds of stale claims in estates where taxes have been imposed under the law but some error has been made in the computation or assessment of the taxes. The words used by Congress were words of limitation, to-wit, "imposed by this sub-chapter." If no tax was "imposed" by the law, then the statute does not apply at all. It seems therefore that Congress has made the law just as it should be, which is that when the United States Government has money in its possession which has been collected outside the law, or not under any law, then that money should be repaid.

(2) If said Statute of Limitations does apply, then it started to run on December 14, 1955.

It will be noted that in the case at bar, no allowable claim for the refund of the money could have been filed until December 14, 1955, when the 1948 will was finally sustained as, and for the first time known to be, the last will. It is submitted that the Statute of Limitations did not begin to run until an allowable claim could be filed.

It has been properly decided in the case of *Hammond, Administratrix, v. U. S. A.*, Case No. 9776 in 40-2 of U. S. Tax Cases, by a United States District Court in Connecticut, in 1940, that the Statute of Limitations (R. S. 3228 of

the Revenue Act of 1924) did not start to run on a claim for a refund of estate taxes based on state inheritance taxes paid until after the state taxes were finally determined and final payment of said state taxes had been paid and the same became a basis for refund, and that the said Statute of Limitations did not start to run with the payment of the estates tax.

The Court said:

> "Thus a claim for refund filed prior to October 16, 1930, for unavoidable lack of compliance with the regulations, would not have been allowable. And it hardly seems sensible to hold the toll of R. S. 3228 began to run before the date on which the taxpayer *could file an allowable claim.* To hold otherwise would mean that a prudent taxpayer would have to follow every partial payment of the State Tax with a sort of inchoate claim for refund. It ought not lightly to be assumed that the statute was designed to foster such a profusion of red tape. Indeed if this construction were followed to its logical conclusion, it would mean that on occasions a taxpayer must bring two or more suits to recover an Estate Tax become excessive by reason of partial payments made on account of the State Tax, or suffer part of his claim to be barred." (Emphasis added.)

Section 3228 of R. S., mentioned in the opinion, had to do with taxes illegally assessed or collected and also with sums "alleged to have been excessive" and provided that claims for refund must be presented within four years next after the payment. In the case cited, the amounts sought to be recovered had become excessive first by the enactment of the Revenue Act of 1926, which provided for a retroactive reduction in the tax rate, and second, by the payment of certain State Inheritance Taxes in 1927 and 1930. The court specifically held that the statute did

not start to run when the payments were made, but rather it started to run when the payments became excessive after the end of the litigation over the State Inheritance Taxes.

In the case at bar no determination of Ohio Inheritance Tax could be properly made until after, and it was made after, December 14, 1955, although, of course, no Ohio Inheritance Tax was assessable on the residuary estate because of the public nature of the Cleveland Public Library.

In the case of *Hoyt, Executor, vs. U. S.*, Case No. 9581 of 37-2 U. S. Tax Cases (1937), the Court of Claims decided that written statements and affidavits supplying the Commissioner with information necessary to an understanding of what was claimed were sufficient claims for refund of estates tax, even though the information was not furnished on Form No. 843. It will be noted that in the case at bar, the original estates tax return disclosed to the Commissioner of Internal Revenue, as alleged in the second paragraph of the complaint (p. 57, *infra*), that litigation was pending concerning the will of 1944. Therefore, the Government was charged with notice of the uncertain status of the 1944 will and of the money paid to and received by it, even at the time the money was paid and received. It appears that the formal claim, when later filed, should be held to relate back to that time, as in the case of *Yajimi vs. U. S. A.*, Case No. 10528 in U. S. Tax Cases, 47-1 (1946), where the filing of a verified complaint in the United States District Court in New York after the time for filing had elapsed, was held to relate back to the time of the filing of the unverified complaint, for the recovery of gift taxes.

It was decided in *United States vs. Memphis Cotton Oil Company*, 288 U. S. 62 (1933), that a claim for re-

fund of income taxes paid, which claim omitted to state the grounds, might be amended after the applicable Statute of Limitations had run, to show the grounds for the claim, even though a new claim would have been barred. The Court said in syllabus three:

> "To give effect by relation to the amendment here in question harmonizes with the Commissioner's practice of re-auditing returns when refunds are claimed."

In *U. S. vs. Factors & Finance Company*, 288 U. S. 89 (1933), the taxpayer filed a claim for refund of income taxes in a specified amount, but omitted the reasons therefor. The Court held that the claim was subject to amendment to show the reasons even after the admittedly applicable Statute of Limitations had run on a new claim. A similar case was *Bemis vs. U. S.*, 289 U. S. 28 (1933).

In the case of *Rosenman, Executors, vs. U. S.*, 323 U. S. 658 (1945), the executors had deposited $120,000,00 with the Collector of Internal Revenue, under protest, as a payment on account of the Federal Estate Taxes. The payment had been made for the purposes of avoiding penalties and interest. The amount paid was placed by the Collector in a suspense account to the credit of the estate. The decedent had died on December 25, 1933. The time for filing the Estates Tax Return had been extended by the Commissioner to February 25, 1935, on which date it was filed and under said return a tax of $80,224.24 was due. On March 28, 1935, said amount was taken from the $120,000.00 deposit and applied in satisfaction of the amount of the tax assessed under the return.

On March 26, 1938, a claim was filed by the executors for refund of $39,775.76, being the balance of the $120,000.00.

However, upon audit of the return, the Commissioner fixed the net tax due at $128,759.08, leaving a deficiency of $48,534.84, which amount was then assessed. The Collector then applied the $39,775.76 still in the suspense account in partial satisfaction of the deficiency and on April 22, 1938, the executors paid the deficiency, or $10,497.34, which included interest on the money due.

The Commissioner then rejected the executors' claim for refund filed in March of 1938.

On May 20, 1940, the executors filed their claim for refund of $24,717.12, basing their claim on additional deductions. The claim was rejected on the ground that the money had been paid more than three years prior to the filing of the claim, except as to the $10,497.54 paid in 1938.

The executors sued in the Court of Claims for recovery of the money and that court held that the claim was barred by the Statute of Limitations. See 53 F. Supp. 722. The Supreme Court granted certiorari because of a conflict.

The Supreme Court construed Section 319 (b) of the Revenue Act of 1926, as amended by Section 810 (a) of the Revenue Act of 1932 and by Section 910 of the Internal Revenue Code of 1939, which provided that a claim for refund of "the tax imposed by this title alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax" and reversed the Court of Claims as disclosed by the syllabus, paragraphs 1 and 2:

> "1. The period of limitations did not begin to run from the time of a remittance which in effect was a deposit and which the Collector placed in a suspense account to the credit of the estate.

"2. As to a balance of the remittance which was applied upon a deficiency subsequently assessed by the Commissioner, a claim for refund filed within three years of such application of the balance, though more than three years from the date of the original remittance, was timely."

The applicable Statute of Limitations was identical with Section 910 of the Internal Revenue Code of 1939, and the court said at page 661:

"The action here complained of was the assessment of a deficiency by the Commissioner in April, 1938. Before that time there were no taxes 'erroneously or illegally assessed or collected' for the collection of which petitioners could have filed a claim for refund. The amount then demanded as a deficiency by the Commissioner was, so the petitioners claimed, erroneously assessed. It is this erroneous assessment that gave rise to a claim for refund. Not until then was there such a claim as could start the time running for presenting the claim."

In the case of *Thomas for the Estate of W. A. Thomas, former Director of Internal Revenue, vs. Mercantile National Bank of Dallas, Trustee of the Estate of Foster*, Case No. 10905 of 53-1 U. S. Tax Cases for 1953, in the Circuit Court of Appeals of the Fifth Circuit, in Texas, involving an action for recovery of an overpayment of Federal Estate Taxes erroneously collected, the United States Government admitted the overpayment, but relied on the Statute of Limitations, 28 U. S. C. A. 910 (now Section 6511(a) of the 1954 Revenue Code), being the Three-Year Statute of Limitations under which the plaintiff was apparently four days late in filing his claim. The District Court decided for the plaintiff. The Circuit Court of Appeals affirmed that decision and said at page 2 of the opinion:

"Until the Commissioner certified the assessment list on August 17, 1945, there was no deficiency assessment and no liability on the part of the taxpayer and consequently nothing to pay. The sum deposited with the collector on August 2, 1945, was merely an advanced deposit to cover additional tax liability expected to arise thereafter. *Neither the estate's liability, nor the fact that there was an overpayment, could be determined until the deficiency assessment was entered. It would be illogical to hold, as the United States contends, that the Statute of Limitations began to run against a claim for refund before the deficiency itself came into existence, and before the fact that there was an overpayment, and if so the amount thereof, became ascertainable.*" (Emphasis added.)

In the case of *Reeves, Administrator vs. United States of America*, No. 11,717 in Volume 57-2 USTC, decided on August 22, 1957, by a United States District Court in Pennsylvania, the administrator of the estate had filed the estates tax return, and paid the estates tax, on February 20, 1950, on the basis of including in the estate certain anticipated income tax refunds for the years of 1943 and 1946 and at that time there was no anticipated income tax for the years of 1943 through 1946 and, consequently, no deduction was taken in the estates tax return for any such obligations.

On November 6, 1952 the Internal Revenue Service had notified the administrator of the estate of an assessment of additional income taxes for those years, and the administrator paid the taxes. On July 6, 1955 the administrator filed a claim for a refund of estate tax claiming a deduction for the additional income taxes paid for the years 1943 to 1946 inclusive, claiming that prior to November 6, 1952 he had no knowledge or information that any such income taxes were claimed. The Internal Revenue Service

determined that the estate tax had been overpaid but refused to refund more than the portion of it which had been paid within three years preceding the filing of the claim for refund on July 6, 1955.

The court commented that there was no dispute that more than three years had elapsed after the payment of the estate tax and said:

> "When a fiduciary files an estate tax return for a taxpayer and correctly pays the estate tax due under the provisions of Internal Revenue Code *based on all facts and circumstances known to him*, and subsequent thereto a deficiency assessment is made by the Internal Revenue Service for income tax liability of deceased taxpayer for years prior to his death which would have entitled the taxpayer to credits in a refund on his estate tax return, when does the three-year statute of limitations commence to run for the filing of a claim for refund of overpayment of the estate tax which is alleged was erroneously or illegally assessed under provisions of Section 910, Section 3772, Section 3774, and Section 7422 of 26 U. S. C. A. and Treasury Regulations 105, Section 81.96?" (Emphasis added.)

The court then said:

> "The statute which contains the three year limitation period provides, inter alia, claims for refund of taxes which are illegally or erroneously assessed or collected must be presented to the commissioner of Internal Revenue within three years of the payment of such tax."

The court said further:

> "*No statute of limitation can begin to run until the cause of action has come into existence*, which in the case of the instant taxpayer did not accrue until November 6, 1952.

It is apparent that any claim for refund of estate tax based on the additional income tax assessment would have met with no success had it been filed prior to the date of the assessment, November 6, 1952. Dixie Pine Products Co. v. Commissioner of Internal Revenue, 320 U. S. 516 (44-1, USTC No. 9107).

It would indeed prove an anomaly were the Internal Revenue Service permitted to assert the defense of the statute of limitations by virtue of circumstances of its own making. I am of the opinion that where the knowledge is with the Internal Revenue Service, a liberal rule should be applied in the application of the statute against the taxpayer. U. S. v. Memphis Cotton Oil Company, 288 U. S. 62 (3 USTC No. 1025).

The inequity and palpable injustice which would arise if a taxpayer would be barred from recouping overpayment of inheritance tax or estate tax resulting from a deficiency assessment on a decedent's income tax after the statute of limitations has purportedly run for the recoupment of overpayment of inheritance tax, is obvious and not to be disputed." (Emphasis added.)

The court cited among other cases, *Bull v. United States of America* and *Rosenman v. United States of America*, both of which are cited in this brief, and held that it had jurisdiction of the parties and of the subject matter, *that the claim was timely filed because it was filed within three years after that portion of the estate tax* became illegal and erroneous and therefore granted judgment for the plaintiff against the United States on the theory of recoupment for the amount claimed, together with interest.

It will be noted that there are many circumstances in which the courts have decided that this statute of limitations, and other somewhat similar statutes, do not start to run at the time stated on the face of the statutes but at a later time dictated by justice applied to the particular circumstances involved in the cases before them.

Therefore, the law applicable to the case at bar is that even if the statute of limitations had any application to the case at bar, still the statute did not start to run until an allowable claim could have been filed, which was December 14, 1955, for the reason that if a claim for the refund of the money had been filed before that date it could not have been allowed until on or after that date because there would have been an estates tax imposed on the estate by law *either* if the 1944 will had proved to be the valid last will *or* if the testator had died intestate.

This question has not been specifically decided by the Supreme Court and the law should be determined.

(3) Assuming that the Statute of Limitations otherwise applies, then money paid to, and collected by, the collector of Internal Revenue of United States of America under a mutual mistake of fact can be recovered if claim therefor is filed within the period of the Statute of Limitations after discovery of the mistake.

In *Kahn vs. Herold*, 147 Fed. (C. C. N. J.) 575 (1906), the executors under a will had paid an Internal Revenue Inheritance Tax under the 1898 Law on a life estate in the mistaken belief that the life tenant was still alive, when in fact, he had died. The tax had been computed and paid on the basis of a normal expectancy of life for the life tenant. Suit was brought for the difference between what the tax should have been, if the fact of the death had been known, and the amount of the tax as paid.

The court held that the excess money paid under these circumstances could be recovered as money paid under a mistake of fact and specifically found that such a payment was not a voluntary payment.

The court held in the third paragraph of the syllabus:

"Where an internal revenue inheritance tax assessed and paid on the supposed value of a life estate, as determined by life tables at a time when the life estate had terminated by the death of the life tenant, but such fact was not known either to the executors or to the internal revenue offices, the executors were entitled to recover the excess of the amount properly taxable under the facts as they actually existed as money paid under mistake of fact."

The court said at page 585 that "payment was made involuntarily and under protest" and was not greatly impressed by the Government's claim that the protest was not sufficient and questioned whether protest under such circumstances was required at all.

The Court commented at page 580 that the executors did not know the fact of the death of the life tenant when they paid the tax and said:

"This of itself made the payment involuntary, and if it did not entirely obviate the necessity of any protest, rendered its form comparatively unimportant."

The Court said further at page 584:

"*The case presented is one of mutual mistake brought about by the ignorance of a controlling fact,* and it *seems to me that law and justice demand that the plaintiffs should be afforded relief.* Suppose a life estate were apparently created by a will and the same was duly valued and taxed, and the tax paid by the executrix, but later it was discovered that in fact no life estate ever existed for the reason that the supposed life tenant had predeceased the testator; surely, in such a case the executor would not be remediless; nor do I see how, in principle, it differs from the case at bar. *Ignorance of fact is a well-recognized ground of relief in all such cases.*" (Emphasis added.)

The court quoted from the case of *U. S. vs. Barlow*, 132 U. S. 271 (1889), from language at page 281 concerning the right in general of any person who has paid money to another under a mistake of fact to recover it back, then said at page 585:

> "It has already been shown that payment made to a public official *when made in ignorance of controlling facts*, is not voluntary, hence I see no reason why the principle declared in the above case should not be applicable to this." (Emphasis added.)

The court held that the executors were entitled to recover the difference between the tax paid and the amount which would have been due, if the true facts had been known, plus interest thereon.

In the case of *Lamborn vs. County Commissioners (Dickinson County, Kansas)*, 97 U. S. 181 (about 1875), the plaintiff was trustee for a land company which had contracted with the Kansas Pacific Railway Company to purchase a large quantity of land in Kansas on which the land company was to pay all taxes and assessments that might be lawfully imposed on the lands and was entitled to a deed from the railway company whenever the purchase money, with interest, etc., had been paid. The land company had proceeded to contract to sell large portions of the lands to persons who had contracted to pay the taxes. The lands in Dickinson County were assessed for taxes for the years 1870, 1871, and 1872, when, in fact, no patent having been issued from the United States Government, said lands were not subject to taxation. However, the Supreme Court of Kansas had decided that they were assessable, and the treasurer of the county had offered the lands for sale for payment of the 1870 taxes, at which sale no person bidding the required amount, the lands were bid

in for the county. At that stage the assessments for 1871 and 1872 were made against the land.

In 1872 the plaintiff had paid in to the treasurer the sums due for taxes, interest, etc., and received tax certificates therefor without making any protest and without knowing that the lands were exempt from taxation, but believing that the taxes were legal and valid. However, after the decision of the United States Supreme Court in the case of *Railway Company vs. Prescott*, 16 Wall. 603, the plaintiff demanded return of his money, with interest, which was refused, and the plaintiff filed suit.

The decision of the District Court is not given, but the judges of the Circuit Court differed in their opinion on the questions of law involved, the majority, however, holding against the plaintiff.

The Supreme Court affirmed the judgment and held that the plaintiff,

> "*Having a knowledge of all the facts*, it is held that he must be presumed to know the law; and in the absence of any fraud or better knowledge on the part of the officer receiving payment, he cannot recover back money paid under such a mistake." (Emphasis added.)

From this reasoning it is submitted that if the case had involved a mistake of fact where there was no knowledge of the true facts, and no means of knowledge of the true facts, then the decision would have been in favor of the recovery of the tax.

The Supreme Court referred to the case of *Stephen vs. Daniels*, 27 O. S. 527 (1875), in which the court held that a payment of a real estate tax to avoid or remove a cloud upon the title arising from a tax sale is a compulsory and not a voluntary payment and therefore recoverable, and commented that in that case the plaintiff had relied

upon the provisions of a local statute, besides which a legal tax was there combined with an illegal assessment, and that perhaps a sale would have conferred a valid title upon the purchaser, and then said at page 188: "Where such would be the effect of a tax sale, we cannot doubt that a payment of the tax, made to prevent it, should be regarded as compulsory and not voluntary."

It will be noted that in the case before the Supreme Court of the U. S., the mistake was primarily a mistake of law and not a mistake of fact, as is the one in the case at bar. Beginning at page 184 the court said:

> "The next question to consider, therefore, is whether money thus paid by way of redemption can be recovered back. There are only three grounds on which such a recovery can be maintained,—fraud, *mistake*, or duress.
>
> "No fraud is charged.
>
> "Mistake, in order to be a ground of recovery, *must be a mistake of fact*, and not of law. Such, at least, is the general rule. 3 Pars. Contr. 398; Hunt v. Rousmaniere, 1 Pet. 1; Bilbie v. Lumley, 2 East, 183; 2 Smith, Lead. Cas. 398 (6th ed. 458), notes to Marriot v. Hampton. A voluntary payment, made with a full knowledge of all the facts and circumstances of the case, though made under a mistaken view of the law, cannot be revoked, and the money so paid cannot be recovered back. Clarke v. Dutcher, 9 Cow. (N. Y.) 674; Ege v. Koontz, 8 Pa. St. 109; Boston & Sandwich Glass Co. v. City of Boston, 4 Metc. (Mass.) 181; Benson & Another v. Monroe, 7 Cush. (Mass.) 125; Milnes v. Duncan, 6 Barn. & Cress. 671; Stewart v. Stewart, 6 Cl. & Fin. 911; and see cases cited in note to 2 Smith, Lead. Cas. 403, 404 (6th ed. 456), Marriot v. Hampton.
>
> "In the present case, there is no dispute that all the facts and circumstances of the case, bearing on

the question of the legality of the tax, were fully known to the plaintiff. He professedly relied on the law, as declared by the Supreme Court of Kansas, and supposed that the tax was legal and valid." (Emphasis added.)

The Court's decision, based upon the authorities cited, was, in effect, that if the payment had been made under a mistake of fact, instead of one of law, the plaintiff would have been entitled to judgment.

The law in the State of Ohio respecting money paid for taxes under a mistake of fact was established in the case of *Woolley vs. Staley, Treasurer of Hamilton County,* 39 O. S. 354 (1883). In that case the plaintiff paid Four Hundred Twenty-four Dollars and Eighty-four Cents ($424.84) to the defendent in the mistaken belief that he owed the same for taxes on a parcel of real estate which he owned. He subsequently learned that he had paid the taxes on said real estate in full prior to said additional payment and, therefore, sued to recover it back. The judgment of the Common Pleas Court was for the defendant, which was affirmed by the District Court.

In the Supreme Court of Ohio, the judgment was reversed. The court said at page 358:

> "There is, however, in the record before us no evidence which, in view of the admitted facts, tends to establish that any tax was due from the plaintiff upon the lot in question, or that any was in fact charged to him upon any duplicate in the hands of the treasurer; which duplicate is alone his authority to receive or collect any money as taxes from the citizen."

The court said further at page 359:

> "* * * that the payment was made under a mistake to an officer having no authority to receive it, wholly without consideration, and under circum-

stances which justified the plaintiff in error in believing that it was charged against him on the duplicate, and that he was obliged to pay it.

"These facts are not questioned here, but the judgment is sought to be maintained on the ground that the payment was voluntary, and hence no action to recover back the money thus paid, can be maintained.

"The error, which appears to us manifest in this position, *is in calling this the payment of a tax.* If it be conceded that the payment was voluntary, in the sense that there was no legal process in the hands of the treasurer, and no duplicate containing the charge upon which he could distrain, or by returning the property delinquent sell the lands, *it nevertheless remains true that it was not the payment of a tax, but of a sum of money under a mistake to persons having no authority to receive it, although claiming such authority.*

It was not a tax. It was never levied by any authority. It was never assessed, legally or illegally, upon any property or against any person. It was never charged upon any duplicate, either originally or by the auditor in the way of correction. It had no semblance of a tax which may be so paid by the voluntary act of the party as will prevent him from recovering it back.

"The payment was made, however, in pursuance of a demand made by this agent of the county commissioners, upon an order from the county auditor to the treasurer, authorizing him to receive it, and the delivery by the treasurer of a receipt for it *as taxes. Assuming that these officers acted in good faith, and upon the belief that the sum was due, it was a mistake.* The fact that they thus acted was sufficient to justify the belief, on the part of the plaintiff, that the requisite steps had been taken to charge his lot with this tax on the duplicate. That alone would justify the treasurer in receiving it, and the plaintiff had the

right to assume that he was acting legally, however illegal the tax might be. *It was, therefore, a payment of money under a mistake of facts, and the question of whether it was voluntary or not is not involved.*" (Emphasis added.)

In the case of *Re Estate of Wampler*, 60 Abs. 593 (1950), the Court of Appeals of Montgomery County held that inheritance taxes paid under a mistake of fact may be recovered, and said at page 603:

> "Nevertheless *the courts have distinguished between payment made under mistake of law and payment under mistake of fact* in determining whether the payment was voluntary. The authority concludes: 'A payment of taxes under a mistake of fact (as distinguished from a mistake of law) has been held not to be voluntary, and is therefore recoverable.' In Vol. 165 A. L. R. page 879 is found this note by the author: 'In the absence of a statutory remedy, an action at law will lie to recover taxes paid where the assessment is wholly void. Such action is equitable in its function.' On page 888 the author states: 'In the following cases courts permitted the taxpayer to recover on the ground of mistake, where the mistake was mutual and the assessment was declared void, even though such mistake arose from the want of care on the taxpayer's part.' Numerous cases from New York are cited to support the rule. While there is diverse authority on this question, due largely to variations in statutory provisions, *the weight of authority and the better rule seems to be that a recovery may be had where taxes are paid under a mistake of fact* upon a void or illegal assessment or order. See North Miami v. Seaway Corporation, 151 Fla. 301, 9 So. (2d), 705."

It will be noted that the government does not rely upon any defense in this case except the Statute of Limitations.

In the case of *Forbes, Executor, vs. Hassett, Collector of Internal Revenue,* Case No. 10,057 of 43-2 U. S. Tax Cases, the District Court in Massachusetts, in 1943, had before it a case in which the estates tax had been paid and some litigation ensued in which a stipulation concerning certain facts afterwards found to be erroneous, had been agreed to by counsel for both sides, but a judgment had not yet been entered on the stipulation. At that stage, the plaintiff filed a claim for refund of additional estates taxes paid, and the Commissioner rejected the claim on the ground that the stipulation barred the claim. The court set aside the stipulation and said:

> "* * * It is obvious that the stipulation was entered into under a clear mistake of fact, and that to allow it to stand would be inequitable and unjust. See The Hiram vs. U. S., 14 U. S. 440; Laughlin vs. Berens, 118 F. 2nd 193; Capano vs. Melchionno, 297 Mass. 1; Aronstam vs. All-Russian Central Union, etc., 270 Fed. 460."

Under the authorities cited above it is respectfully submitted that money paid, and collected, under a mutual mistake of fact of such a character that under the mistake of fact the money would have been due as estates taxes but, when the true facts are known, it appears that no estates tax was imposed on the estate by any law, then the money can be recovered especially when, as in the case at bar, the claim for the refund was filed within the allegedly applicable statute of limitations after discovery of the mistake of fact.

The decision in the courts below was contrary to the language of this Court in the case of *Lamborn vs. County Commissioners,* 97 U. S. 181, *supra* at page 33 of this brief, and disregards the law re recovery of money paid and collected under a mutual mistake of fact.

(4) It was error for the courts below to fail to pass specifically upon the foregoing issues, all of which were seriously raised and carefully briefed and argued, none of which have heretofore been determined in the Supreme Court but which should be decided here.

It will be noted that the District Court and the Court of Appeals held that the statute of limitations started to run agains the claim, not with the payment of the tax, as provided in that statute, but on April 16, 1953, when the last will, dated 1948, was admitted to probate.

However, the complaint, 1a, alleged that the plaintiff, although he qualified at once as executor of the 1948 will after its probate, was prevented from filing an *allowable* claim for the refund of the money by the pendency of two actions to contest said will, both of which were filed shortly after its probate, until said actions were terminated on December 14, 1955, by the sustaining of said 1948 will as the real will of the testator.

It is respectfully urged that the statute of limitations could not, under the law, start to run until an allowable claim could have been filed.

This construction of the law, supported by cited authorities, was urged in both the District Court and the Court of Appeals and was not mentioned by either court in its decision.

Another, and equally significant proposition urged in both courts below and not mentioned in the opinion in either court, (pp. 58-62, *infra*) is that the statute of limitations relied upon by the defendant, by its very terms, has no application to the case at bar.

It is here urged that it was special error for said courts below to disregard said propositions which were so carefully and sincerely presented to them.

The Court of Appeals rested its decision on Section 7422(a) of the 1954 Internal Revenue Code which reads as follows:

> "SEC. 7422. CIVIL ACTIONS FOR REFUND.
>
> (a) No Suit Prior to Filing Claim for Refund.—No suit or proceeding shall be maintained in any court for the recovery *of any internal revenue tax* alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, *according to the provisions of law in that regard,* and the regulations of the Secretary or his delegate *established in pursuance thereof.*" (Emphasis added.)

Attention of the Court is called to the fact that the said section, by its terms, relates to "*any internal revenue tax alleged to have been erroneously or illegally assessed or collected*" and that the money sought to be recovered in this case was not an internal revenue tax and also that the complaint contains no allegation in terms that it was a "tax" erroneously or illegally collected.

It is true that the money was paid to the defendant and collected by the defendant under the mutual mistake of fact that the earlier will was the last will and that under that will the estate would have been subject to an estate tax and the payment would have been proper, although when the true facts were first known on December 14, 1955, it was apparent that the money paid was not a tax but money paid under a mistake of fact.

It is further true that the facts alleged in the complaint do in the aggregate show that the money was improperly collected, although the facts were not so alleged because of Section 7422(a), but solely for the reason that

said facts were, and are, the true facts of this case and that under all principles of law, those facts entitle the estate of the decedent to the repayment of the money. It will be noted also, that Section 7422(a) does not stand alone on the subject of jurisdiction but ties into the statute of limitations by providing that a claim must be duly filed "according to the provisions of law in that regard" which language in its application to this case necessarily refers to Section 910 of the Internal Revenue Code of 1939, so that the case at bar must turn on a construction of Section 910.

Further, the attention of the Court is called to the fact that the petitioner, in the case at bar, is in court under the statutes mentioned in the complaint "Section 1346(a)(1) and 2402 of the Judicial Code amended by the act of July 30, 1954, P. L. 559, passed by the 83rd Congress, and by Section 7422 of the Internal Revenue Code of 1954," not because the money was a tax but because it was paid *as a tax* and these statutes offered the most logical procedure for recovery of the money.

The petitioner does not admit that the money was a tax because whether an estate is subject to an estate's tax depends upon the true facts and if, when the true facts are discovered, there is no tax, then the money collected under a mistake of fact should be returned if timely claim is filed thereafter.

It is apparent that neither of the courts below have given reasons for deciding two of the important issues in this case, namely, whether Section 910 is applicable, and whether money paid to the government under a mutual mistake of fact can be recovered without regard to this statute. The courts below, however, held, *contrary to the words of limitation contained in said statute limiting it to* "the tax imposed by this subchapter," that it did apply.

And they also held, contrary to the cases cited to them, that money paid to the government "as a tax" under a mutual mistake of fact cannot be recovered even where claim therefor has been filed within the period of the statute after discovery of the true facts.

These important decisions were reached without citing law clearly sustaining their decisions or disclosing any reasoning which sustains them.

The lower courts could see clearly the necessity under the law for setting a date later than given in Section 910 for the starting of the statute against a claim, which is "within three years of the payment of such tax" and they set April 16, 1953 (when the executor of the 1948 will qualified as executor). If the courts have the power and the duty to set such later date so clearly outside the statute, why should the date not be set for December 14, 1955 which was the first date on which the petitioner could have filed an allowable claim, and accomplish the justice of returning this money?

RE ARGUMENT OF DEFENDANT IN THE COURTS BELOW.

Counsel for the defendant contend that Section 910 of the Internal Revenue Code of 1939 applies to this case because the money was paid, and collected, "as an estate tax." They use the word "as" in the sense of "like" or "in the nature of." However, to say that A looks like B is a very different thing than saying that A is B.

Counsel contend that the statute should be construed to include claims for the refund of money paid "as an estate tax." However, since tax statutes must be construed favorably to the tax payer and strictly against the government, the court cannot extend this statute to include a claim for refund of money in an estate where no tax was

imposed by law, especially where the nature of the beneficiary was such as to make the estate expressly exempt from the tax.

The plain answer to the defendant's argument is that that statute is limited by its terms to estate taxes "imposed" by law and does not relate in any particular to money paid *as* an estate tax and it cannot be extended beyond the terms used by Congress. If the Congress had intended that statute to apply to claims for money paid *as* estate taxes it could have, and would have, so provided.

The omission to make that provision clearly discloses the intention of Congress to have no statute of limitations whatsoever to claims for refunds of money collected by the United States under mistakes of fact. And isn't that exactly as it should be?

Certainly, in any event, such a statute, even if clearly applicable to a claim, should not, and, it is submitted, does not start to run until the mistake of fact has been discovered nor until an *allowable* claim could be filed.

Counsel for the defendant have cited no case in which this statute of limitations has been held applicable to circumstances such as those in the case at bar and seem to be more concerned with what they would like the law to be than with what it is.

Counsel refer to Section 7422(a) of the Internal Revenue Code of 1954 and claim that it prevents recovery of the money in dispute. The answer to that argument is that this statute refers by its very terms to "any internal revenue tax" or "any sum" wrongfully collected and provides that no suit for such money may be maintained until a claim for refund has been duly filed. Certainly if the statute has application at all to this case then the claim filed by the appellant on August 30, 1956, was duly filed within

the terms of said statute as the law has been construed by the courts as shown by the cases cited *supra* in this brief.

That Section was mentioned in the complaint in the case at bar because of the procedural implications of it and because Sub-section (b) reads as follows:

> "Protest or Duress—Such suit or proceeding may be maintained whether or not such tax, penalty or sum has been paid under protest or duress."

Attention of the Court is again called to the proposition that in the case at bar not only was there no estates tax imposed on the estate by law, but this estate was by law exempted from the estates tax.

Counsel for the government have discussed their theories as to what they believe Congress meant by Section 910 of the Internal Revenue Code of 1939 but they have cited no cases supporting their theories in any case similar to this.

At page 8 of their brief in the Court of Appeals, counsel say "If an estate tax has been paid—and it was paid in this case—* * *"

We respectfully deny the truth of the statement that an "estate tax" was paid in this case and we mention it here specifically because the difference between the petitioner and counsel for the defendant arises to a large extent in the fact that counsel for the government know that in order to sustain their position that the statute of limitations applies to this estate they must convince this Court that any payment "as a tax" is the *same* as a "tax."

In this case it was first known that the 1948 will was the real last will of the testator on December 14, 1955, and that is the time when it was first disclosed that there was no estate tax imposed on this estate by law and, therefore, that was the first date on which an allowable claim could have been filed for the refund of the money paid

in the mistaken belief that the 1944 will was the real will of the testator.

Counsel cited the case of *Jones vs. Liberty Glass Co.*, 332 U. S. 524, (1947). That case involved income taxes and the court properly construed Section 322(a) of the Internal Revenue Code of 1939, holding that the word "overpayment" in that statute covered income taxes erroneously or illegally collected.

The word "overpayment" was not used in Section 910 which is involved in the case at bar. Its absence is significant. The word was included in Section 6511(a) in the Internal Revenue Code of 1954, which is the successor to Section 910 of the Internal Revenue Code of 1939, and its later inclusion in the statute of limitations lends weight to our contention that its omission from Section 910 is significant.

In their brief in the Court of Appeals counsel for the government say of petitioner:

> "Appellant also argues that the Section 910 time limit for filing refund claims has no application if it appears that collection *of an estate tax* was completely erroneous. (Br. 5-7, 18.) Appellant contends that if the estate actually owes no tax at all, then no tax was 'imposed' by Congress. According to appellant, this means that Section 910 is inapplicable since it refers only to cases where the taxpayer is claiming a refund of 'the tax imposed by this subchapter.'
>
> In making this argument, appellant forgets that the general requirement for filing a timely claim is set out in Section 7422(a), and that the only purpose of Section 910 is to define the period available for making such a claim in a particular category of cases. The reference to 'the tax imposed by this subchapter' is included in Section 910 simply to indicate that the stated time limit for filing refund claims is applicable

only in estate tax cases. There are a number of other sections in the Code which establish different time limits for filing refund claims where the taxpayer is seeking to recover alleged overpayments of income taxes, gift taxes, or miscellaneous taxes. Since the time limits vary, hopeless confusion would have resulted if Congress had not used appropriate language to indicate that each time limit was applicable only to refund claims for the type of tax in question. Thus, when Congress said that the limit in Section 910 is applicable to 'All claims for the refunding of the tax imposed by this subchapter,' Congress was simply making sure that the time limit would not be applied to other cases where the taxpayer was seeking to recover other types of taxes.

In other words, when Section 910 prescribes a time limit for filing refund claims in all cases where the taxpayer is seeking to recover 'the tax imposed by this subchapter,' the time limit applies to all cases where the taxpayer is seeking to recover estate taxes. The time limit for filing claims has nothing to do with the merits of the taxpayer's claim for relief. If an estate tax has been paid—and it was paid in this case—Section 910 gives the taxpayer a limited length of time to file a claim for refund of that tax, regardless of whether he is entitled to recover part of the tax or all of it."

We submit that Counsel's argument is fallacious and they cited no authority whatsoever which sustains the construction which they seek.

We certainly do not admit that an estates tax was ever paid in this case and counsel cannot show the truth of their statement that an estates tax was paid in this case.

In the Court of Appeals counsel for the government contended that the words "the tax imposed by this subchapter" were included in Section 910 "simply to indicate that the stated time limit for filing refund claims is ap-

plicable only in estate tax cases." Their argument was based on the theory that this must be true because other sections in the code establish different time limits for filing refund claims for other types of taxes.

Counsel cited no authority for such argument and we deny that the argument is sound because meaning must be given to all the words in the statute. When that is done, the section is clearly applicable to claims for refunds of estate taxes and that must mean to be applicable to refunds arising from some error in computation or mistake of law respecting the tax, which has resulted in an overpayment of the tax.

Counsel for the government has cited no case, nor have we been able to find any, which construes Section 910 as having any application in any case similar to that at bar in any important respect whatsoever.

Here we have payment and collection under mutual mistake of fact, litigation preventing discovery of the mistake and preventing the filing of an allowable claim until December 14, 1955, after which claim was duly filed.

Counsel have attempted to state the petitioner's position to be that where suit is for the entire payment then no timely claim need be filed. That is not a correct statement of our position, which is that Section 910 of the Internal Revenue Code of 1939 is limited by its terms to estates where a tax has been imposed by law and that even if that statute were construed to apply to the estate in the case at bar, then the claim was filed in ample time as the courts have construed the law in the cases cited.

Counsel next contend that petitioner knew about both wills before the money was paid and that, therefore, the law should not be construed in his favor. The record shows clearly that petitioner did not pay the money in this case and it is equally clear that if he had filed a claim for

the money on the same day that he was appointed executor of the 1948 will, or at any time within three years thereafter (or at any other time before December 14, 1955), the Director of Internal Revenue could not have allowed the claim because two actions were filed to contest the 1948 will and if that will had been set aside then the 1944 will might have been entitled to be probated again and it would then have been later sustained or set aside. If either the 1944 will had been the true will or if the testator had died intestate the claim for refund of the money paid could not have been allowed because the facts would then have been such that an estate tax would have been imposed on this estate by law. Therefore, the first date on which an allowable claim could have been filed was December 14, 1955. The claim was filed on August 30, 1956.

Counsel for the appellee claim that the probate of the 1948 will rendered the 1944 will completely inoperative and rely on Sections 10504-27 and 10504-28 of the Ohio General Code (now Sections 2107.22 and 2107.23 of the Revised Code*) and on *Stafford vs. Todd*, 17 O. App. 114 (1921). An examination of the facts and of the decision

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* SECTION 2107.22 of the Revised Code (Section 10504-27 and 10504-28 of the General Code) reads as follows:

"Probate of Will of Later Date.

When a will, or its authenticated copy has been admitted to probate or to record and a will of later date, or its authenticated copy, is presented to the same probate court for probate or record, notice, with the will annexed, of such earlier will and the beneficiaries therein shall be given to the surviving spouse, the next of kin, and the personal representative of the testator, in the manner and for the time such court directs. Such court may admit the later copy to probate or to record as if no earlier will or copy of one had been admitted. In such case, the proceedings shall be the same as if no other will had been proved or recorded.

If the court as a result of such hearing admits the later will or authenticated copy to probate or to record, its order

(Continued on following page)

in the case cited will disclose that they do not support the position of counsel.

Actually the litigation between the two wills in the case at bar had determined only one thing up to December 14, 1955, and that was that the 1948 will was properly executed later than the 1944 will. Prior to December 14, 1955 there had been no final decision as to the testamentary capacity of the testator at the time of the execution of either of the wills nor had there been a final determination prior to that date as to whether any undue influence was involved in the execution of either will. Any claim for refund of this money filed prior to that date would have been premature and could not have been allowed.

Counsel for the government have cited a number of cases involving special circumstances and in which the facts involved show them to be inapplicable to the case at bar.

(Continued from preceding page)

shall operate as a revocation of the order admitting the instrument earlier in date to probate or record, and the court shall enter on the record of the earlier will a marginal note 'later will admitted to probate * * *' (giving date admitted)."

SECTION 2107.23 of the Revised Code (Section 10504-32 of the General Code) reads as follows:

"Contest of Will Within Six Months; Exceptions.

If within six months after a will is admitted to probate no person files an action to contest the validity of the will, the probate shall be forever binding, except to persons under any legal disability, or to such persons for six months after such disability is removed. The rights saved shall not affect the rights of a purchaser for value in good faith, a lessee for value in good faith, or an encumbrancer for value in good faith, nor impose any liability upon a fiduciary who has acted in good faith, or upon a person delivering or transferring property to any other person under authority of a will, whether or not such purchaser, lessee, encumbrancer, fiduciary, or other person had notice, actual or constructive, of such legal disability."

On the other hand, counsel for the petitioner has cited cases establishing the law that payments made as taxes under mistake of fact may be recovered. See *Kahn vs. Herold*, 147 Fed. 575 (C. C. N. J.) (1906) (page 31, *supra*).

Lamborn vs. County Commissioners, 97 U. S. 181 (1875) (page 33, *supra*);

Woolley vs. Staley, 39 O. S. 354 (1883) (page 36, *supra*).

And cases holding that the principle of recoupment is applicable to various circumstances to avoid the statute of limitations:

Bull vs. U. S., 295 U. S. 247 (1935) (pages 15-20, *supra*);

Dunigan vs. U. S., No. 9338 of 38-2 U. S. T. C., 23 F. Supp. 467 (page 17, *supra*).

And finally cases holding that the statute of limitations relied on by the government and similar statutes do not start to run until an allowable claim can be filed, which in the case at bar was December 14, 1955.

Hammond vs. U. S., No. 9776 in 40-2 U. S. T. C. (1940) (page 22, *supra*);

Rosenman vs. U. S., 323 U. S. 658 (1945) (page 25, *supra*);

Thomas vs. Mercantile National Bank of Dallas, No. 10905 of 53-1 U. S. T. C. (1953) (page 27, *supra*);

Reeves vs. U. S., No. 11,717 of 57-2 U. S. T. C. (1957) (page 28, *supra*).

We have succeeded in obtaining possession of a carbon copy of a letter sent to the Collector of Internal Revenue by Mr. James V. Suhr, attorney for the executor of the 1944 will, in which he called attention to the pending

litigation and referred to the return which he was preparing to file as "this tentative return."

The letter was dated November 2, 1951, just two days before the time within which an estates tax return was required to be filed. It reads as follows:

"November 2, 1951

Collector of Internal Revenue
Estate and Gift Tax Division
622 Huron Road
Cleveland, Ohio

Attention Eleanor Kay

Gentlemen:

Re: IT:EG:EX:S
Estate of Nathaniel H. Woods.

As attorneys for Mervin Roy Wolff, Executor of the Estate of Nathaniel H. Woods, deceased, we request an extension of at least thirty days for the filing of the estate tax return in the above estate.

The reason for this request is that there has been considerable litigation in connection with this estate including two suits to contest the will and an item of litigation pertaining to the admission of a second will. For some time we were under the impression that this return would have to be delayed until all these matters were disposed of but realizing that interest would accumulate on the federal tax, we decided to estimate the state inheritance tax and file the federal return.

We are now in the process of preparing this tentative return but need the additional time to complete it.

Very truly yours,
JAMES V. SUHR

JVS: c"

It seems that this letter, taken in connection with the return itself, in which in Schedule M it was disclosed that litigation was pending concerning the 1944 will, put the government on notice that that return was not to be considered a final return because of the pending litigation, and that the Internal Revenue Department should have repaid this money without suit and as soon as the true facts were determined in the state courts and brought to their attention.

The authorities cited in the Court of Appeals and in the District Court by counsel for the defendant involved mistakes of law, not mistakes of fact, and Section 7422(a) of the Internal Revenue Code of 1954 has to do only with cases in which the Congress has imposed a tax and has no application to cases in which no tax has been so imposed, as in the case at bar.

It will be noted that the statute deals only with "any internal revenue tax" and provides that no suit may be maintained for the recovery of such a "tax" until a claim for refund has been duly filed according to the provisions of the *law* in that regard, and the regulations "established in pursuance thereof."

No "tax" having been "imposed" on this estate by any law, the section does not apply to this action. Furthermore, if there had been a "tax" imposed on it, the claim for refund was clearly filed within the provisions of the law as construed in the authorities hereinbefore cited.

CONCLUSION.

It seems clear that the Statute of Limitations relied upon by the defendant as the sole reason for refusing to return this money has no application to the case at bar whatsoever, as disclosed by its very terms; that if the Statute of Limitations otherwise had any application, it still did not start to run until an allowable claim could have been filed, which was December 14, 1955; that well within the statutory limits thereafter a claim was duly filed and improperly rejected; that the money which is the subject of this action was paid, and collected, under a mutual mistake of fact, not under any law whatsoever (and contrary to the express terms of the statute exempting bequests to corporations of the type which includes the Cleveland Public Library); that therefore this Statute of Limitations was never intended to apply to such a situation; and that the motion of the plaintiff for summary judgment in the District Court should have been granted and that of the defendant denied. For these reasons, it is urged that the decision in the Court of Appeals affirming the United States District Court should be reversed and final judgment entered for the petitioner.

Respectfully submitted,

ROBERT MERKLE,
1019 Williamson Bldg.,
Cleveland 14, Ohio,
Attorney for Petitioner.

APPENDIX.

COMPLAINT FILED IN DISTRICT COURT.

(Filed December 4, 1956.)

1. Now comes Henry N. Walkden, as the duly appointed, qualified and acting executor of the last will and testament of Nathaniel H. Woods, deceased, the plaintiff herein, and for his complaint says that the defendant has in its possession and control the sum of thirteen thousand four hundred seventy-six dollars and fifty cents ($13,476.50) received by it and/or collected by it without any authority of law, from the duly appointed, qualified and acting executor of an earlier will of said decedent, under the mistake of fact that said earlier will was the last will and testament of said decedent, under which earlier will said money would have been due and payable to the defendant through the District Director of Internal Revenue at the City of Cleveland, State of Ohio, as and for estate taxes on the estate of said decedent, when in fact, said earlier will was then being contested and was later set aside in the courts; that the real last will and testament, under which the plaintiff is executor was duly admitted to probate and although contested was finally duly sustained as the last will and testament of said decedent in the courts on the 14th day of December, 1955; that under said last will and testament the Cleveland Public Library, which is a corporation organized and operated under the laws of the State of Ohio, exclusively for charitable, scientific, literary or educational purposes, no part of the net earnings of which inures to the benefit of any stockholder or individual, and no part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, is the residuary and principal beneficiary, and no estates tax at all was, or is, chargeable against said estate by any act of the Congress of the United States or by any law of the land whatsoever; that said money was paid, collected and received under a mistake of fact as to the validity of said earlier will; that this plaintiff was prevented from filing a claim for refund of said money, by reason of the pendency of two actions to

contest the said last will and testament of the decedent, until the final determination of said last will contest actions by the sustaining of said will on the 14th day of December, 1955; that on the 30th day of August, 1956, he filed, in duplicate, a Corrected Estates Tax Return with the District Director of Internal Revenue at Cleveland, Ohio, which return disclosed that the earlier will had been set aside and that the last will and testament of the decedent had been admitted to probate, contested and duly sustained on said 14th day of December, 1955, and that no estates tax whatsoever was, or is, assessable against said estate because of the charitable, scientific, literary or educational purposes of the Cleveland Public Library, the residuary beneficiary thereof; that at the same time, and attached to said Corrected Estates Tax Return, he filed a claim, in duplicate, on the form prescribed by the Department of Internal Revenue, being form No. 843, for refund of said thirteen thousand four hundred seventy-six dollars and fifty cents ($13,476.50), with interest; that attached to each copy of said Corrected Estates Tax Return and said claim for refund was a photostatic copy of the last will and testament of the decedent duly certified as such by the Probate Court of Cuyahoga County, Ohio, and that together with said documents he also filed a certificate of the Probate Court of Cuyahoga County showing the appointment and present qualification of Henry N. Walkden, as executor of said last will and testament, and a designation of Robert Merkle to act as his attorney of record, in connection with said claim; that said claim was improperly and illegally rejected by said District Director of Internal Revenue on the 10th day of October, 1956, on which date notice of said rejection was mailed to this plaintiff and his counsel; and that suit for the recovery of said money is authorized by Sections 1346(a)(1) and 2402 of the Judicial Code, amended by the Act of July 30, 1954, P. L. 559, passed by the Eighty-third Congress and by Section 7422 of the Internal Revenue Code of 1954.

2. Plaintiff says further that said decedent died a resident of, and domiciled in, Cuyahoga County, State of Ohio, on the 4th day of August, 1950; that the executor

of the earlier will filed an estates tax return with the District Director of Internal Revenue at Cleveland, Ohio, in which he disclosed in Schedule M thereof to the defendant the pendency of litigation concerning said will, and the defendant was thereby charged with notice of the uncertain status of said money, notwithstanding which, said District Director of Internal Revenue collected from said executor the sum of eleven thousand nine hundred forty-nine dollars and eighty-one cents ($11,949.81) on December 3, 1951, of which he refunded two dollars and seventy-seven cents ($2.77) on February 8, 1952, leaving a balance of eleven thousand nine hundred forty-seven dollars and four cents ($11,947.04), and then made an additional assessment which said executor of said earlier will was required to pay, and did pay, on the 14th day of January, 1953, in the amount of fourteen hundred thirty-nine dollars and thirty-two cents ($1439.32), together with interest thereon in the amount of ninety dollars and fourteen cents ($90.14), or a total payment at that time of fifteen hundred twenty-nine dollars and forty-six cents ($1529.46), making the total sum of thirteen thousand four hundred seventy-six dollars and fifty cents ($13,476.50) wrongfully and without any authority of Congress or any law of the land, collected from the decedent's estate by the defendant, for which sum, with interest at 6% on eleven thousand nine hundred forty-seven dollars and four cents ($11,947.04) thereof from the 3rd day of December, 1951, and on fifteen hundred twenty-nine dollars and forty-six cents ($1529.46) thereof from the 14th day of January, 1953, the plaintiff is entitled to judgment against the defendant.

3. WHEREFORE, plaintiff prays for judgment against the defendant in the sum of thirteen thousand four hundred seventy-six dollars and fifty cents ($13,476.50), plus interest at 6% on eleven thousand nine hundred forty-seven dollars and four cents ($11,947.04) thereof from the 3rd day of December, 1951, and on fifteen hundred twenty-nine dollars and forty-six cents ($1529.46) thereof from the 14th day of January, 1953, as authorized by law,

together with his costs herein; and that he be granted such other and further relief as he may be entitled to receive.

ROBERT MERKLE,
Attorney for Plaintiff.

(Verification omitted.)

MEMORANDUM OF DISTRICT COURT ON MOTION TO DISMISS.

(Filed May 20, 1957.)

JONES, *J.*:

This is an action for refund of taxes alleged to have been erroneously assessed and collected. The Government has moved to dismiss on the ground that the claim is barred by the statute of limitations, and on the ground that certain procedural requirements have not been met.

Specifically, the claim is for refund of estate taxes paid on the estate of Nathaniel Woods by the executor under a will executed prior to the one which was finally determined to be his last will and testament. This last will leaves property to the Cleveland Public Library. There is no claim that the taxes paid by the original executor were illegally assessed or collected, but only that they were assessed and paid under a mutual mistake of fact; to-wit, the belief that the first will was valid.

Section 910 of the Internal Revenue Code of 1939, 26 U. S. C., 1952 ed., Sec. 910, states:

> "All claims for the refunding of the tax imposed by this subchapter alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years after the payment of such tax."

The taxes were paid more than three years prior to the filing of the claim for refund. However, it is apparent that any allegation that the taxes were erroneously collected would have been false prior to December 14, 1955, when litigation declaring the second will valid was terminated.

Our question, then, is whether the set of facts existing in this case modifies the unequivocal meaning of the words of the statute of limitations. From a study of the cases, it is apparent that this is truly a case of first instance.

On the one hand, there is the statute, which in plain English states that no refunds shall be claimed more than three years after payment of taxes alleged to be erroneously or illegally assessed. On the other hand, the fact remains that no claim could have been made prior to December 14, 1955.

If this claim is barred by the statute, the substantive rights of the parties are being affected by the length of the docket in the courts of Ohio, for if litigation could have been terminated within three years of the payment, there would be no defense to this action.

Statutes of limitations can be considered codification of the equitable doctrine of laches. Their purpose is to prevent the assertion of stale claims. This claim is by no means a stale one, for it was made in August, 1956, less than nine months after the right to bring it had been finally determined.

It is the considered judgment of the court that in the circumstances of this case, and strictly limited to the facts here involved, the statute should be construed as running from the time the right to claim an erroneous assessment was determined, rather than from the time of the remittance to the taxing authorities. Any other result is against all conscience.

The Government also contends that suit was brought within six months after the claim was filed and before such claim was denied by the Commissioner. The complaint, however, alleges a denial of the claim by the District Director before suit was brought. It would seem that the Government must show that the District Director is not authorized to act for the Commissioner in these matters.

Accordingly, the motion must be denied.

JONES,

United States District Judge.

MEMORANDUM OF DISTRICT COURT ON MOTIONS FOR SUMMARY JUDGMENT.

(Filed October 30, 1957.)

JONES, *J.*:

Both parties move the court for summary judgment in the above entitled action.

In the memorandum of May 20, 1957, denying the defendant's motion to dismiss, the court ruled that in these peculiar circumstances the statute, 26 U. S. C., 1952 ed., Sec. 910, "should be construed as running from the time the right to claim an erroneous assessment was determined, * * *" and that "it is apparent that any allegation that the taxes were erroneously collected would have been false prior to December 14, 1955, when litigation declaring the second will valid was terminated." The court did not have before it the fact that the second will was admitted to probate on April 16, 1953.

Accordingly, since the claim for refund could have been made on or within three years after April 16, 1953, and was not made until June 20, 1956, the motion for summary judgment of the defendant must be granted, and that of the plaintiff denied.

/s/ JONES,

United States District Judge.

MEMORANDUM OF DISTRICT COURT ON MOTION FOR RECONSIDERATION.

(Filed December 5, 1957.)

JONES, *J.*:

Plaintiff moves the court for reconsideration of its order granting defendant's motion for summary judgment, entered October 31, 1957.

The court has twice previously considered the merits of this case. On defendant's motion to dismiss, the court ruled that under the peculiar circumstances of this case, the Statute of Limitations for the filing of a claim for refund of Estates Tax, Section 910 of the Internal Revenue

Code of 1939, 26 U. S. C. A., should not be held to begin to run until such time as a valid claim could be filed, it appearing that this date was December 14, 1955. On the motions for summary judgment, the additional fact was brought out that this plaintiff was appointed executor of the second Will on April 16, 1953, when said Will was admitted to probate.

While the 1955 date was well within the three year period, the 1953 date was not.

The court has previously considered fully all the propositions urged by plaintiff in this motion, has given him the benefit of the most favorable rule under the law, and has no alternative at this time but to deny this motion for reconsideration.

It is my considered judgment that further discussion of the problems involved in this case would not bring about a reversal of the decision made after full review of the written arguments presented by briefs. For this reason, further argument orally is not thought necessary and will be denied.

/s/ JONES,

United States District Judge.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed May 21, 1958.)

Before MARTIN, MILLER and STEWART, Circuit Judges.

PER CURIAM. In this case, where an estate tax was paid in December of 1951 by the executor of a decedent's will which had been duly admitted to probate, but was superseded by a second or later will, admitted to probate on April 16, 1953, and subsequently sustained as valid in litigation, District Judge Paul Jones held that the three-year statute of limitation began to run against the claim for refund of the estate tax paid by the executor of the first will from April 16, 1953, and that the claim for refund

made by the executor of the second will was barred because not made until June of 1956—more than three years from the critical date when the executor of the second will could have filed his claim for refund.

Section 7422(a) of the 1954 Internal Revenue Code provides that no suit or proceeding in any court for recovery of any Internal Revenue tax alleged to have been erroneously assessed or collected shall be maintained until a claim for refund has been duly filed. Numerous federal decisions have held that, in the absence of a showing of the timely filing of a claim for refund, the courts are compelled to dismiss suits for refund for lack of jurisdiction. See *Dysart v. United States*, 95 F. (2d) 652, 654 (C. A. 8), certiorari denied 305 U. S. 608; *Fawcett v. United States*, 164 F. (2d) 696 (C. A. 9), affirming 70 F. Supp. 742, 743 (N. D. Cal.). Section 910, Internal Revenue Code of 1939 [58 Stat. 138; 26 U. S. C. § 910]; provides a limitation period of three years from payment of the tax for the refunding of taxes imposed by the applicable sub-chapter and alleged to have been erroneously assessed or collected.

We are of opinion that the judgment of the district court was correct and should, accordingly, be affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed May 21, 1958.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.